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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

I.

THE SEARCH AND SEIZURE.

A. The search and seizure questions are properly before this Court for decision.

In its brief on the merits (pp. 21-24) the government makes the claim (not asserted in its Brief in Opposition) that the search and seizure questions should not be reached because petitioners failed to make a showing of their "right" to have the seized

property suppressed and failed to comply with Rule 41(e), F. R. Crim. Pro. This contention is not valid.

1. This Court, unlike some of the lower federal Courts, has never held that one must have a "right" of ownership or even possession in order to challenge an unconstitutional search or seizure. The right of the people to be free from such searches and seizures cannot be made to turn upon questions of title or possession. It is a constitution of a free democracy, and not a conveyancer's deed, with which we are here concerned. This case involves not a question of private property rights, but rather the enforcement by the federal Courts of constitutional limitations imposed upon federal officers.

As Mr. Justice Murphy, dissenting for himself, Chief Justice Stone and Mr. Justice Frankfurter, said in *Goldstein v. United States*, 316 U.S. 114, 127, the lower federal cases, imposing a possessory interest qualification, cannot be squared with Mr. Justice Holmes' observation in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, that the "essence" of the amendment is that evidence illegally obtained "shall not be used before the Court . . . [or] . . . at all . . . [T]he knowledge gained by the government's own wrong cannot be used by it . . ."[1]

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[1]Mr. Justice Murphy observed that to allow the government to use evidence obtained in violation of the Fourth Amendment against parties "not victims of the unconstitutional search and seizure", is to allow the government to profit by its own wrong, and to reduce in large measure the protections afforded by the amendment. *Goldstein v. United States*, 316 U.S. 114, 127, n. 4.

The majority opinion in *Goldstein* is not controlling here since admittedly it did not concern itself with a search and seizure pro-

Not only is the government's attempt to restrict the protection of the amendment to those who "claim" the illegally seized property, contrary to the repeated admonitions of this Court that its "guaranties are to be liberally construed to prevent impairment of the protection extended" (*Grau v. United States*, 287 U.S. 124, 128; and see, *Boyd v. United States*, 116 U.S. 616; *Weeks v. United States*, 232 U.S. 383; *Gouled v. United States*, 255 U.S. 298; and cf. *Quinn v. United States*, 349 U.S. 155), and to its observation that "a quibbling distinction" will not be permitted "to overturn a principle which was designed to protect a fundamental right" (*United States v. Jeffers*, 342 U.S. 48, 52), but it would result in posing for the accused a Hobson's choice. On the one hand, he would be required to assert an "interest" in the property seized before he could move for its suppression; on the other, by so doing he might very well establish for the government an element—or sometimes the element—of the offense charged. The amendment which was insisted upon by the people as a condition of the ratification of the Constitution, could not have been intended to require this. One is not compelled to abandon the protection given by the Fifth Amendment in order to assert the guarantees of the Fourth. Cf. *Agnello v. United States*, 269 U.S. 20, 35. Nor has this Court ever suggested as much.

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hibited by the Fourth Amendment (316 U.S. at 120), and involved only the objection that messages intercepted allegedly in violation of the Federal Communications Act (47 USCA 605) were used "outside the court room and prior to the trial" and "induced" evidence which would otherwise have been admissible (*ibid.*, at 121).

Furthermore, the Federal Rules of Criminal Procedure on their face require a rejection of the position urged by the government. Those rules do not limit the motion to suppress to those who "own" or "possess" or even claim ownership or possession of illegally seized property; rather, they provide that the "person aggrieved" by the illegal and unconstitutional actions of the officers may move for the return or suppression of the property. F. R. Crim. Pro. 41(e). An illegal seizure taints the evidence thereby obtained, and the rule of suppression is "a restriction *upon the power of the court* to permit the introduction of such tainted evidence." *United States v. Janitz,* 6 F.R.D. 1 (D., N.J., 1946), appeal dismissed, 161 F.2d 19 (3 Cir., 1947).

In any case, the record here clearly reveals that petitioners were in "possession" of the premises at the time of the illegal search, and this alone is enough to give them "standing" to challenge the illegal seizure. *Cofer v. United States,* 37 F.2d 677 (5 Cir., 1930); *Hobson v. United States,* 226 F.2d 890 (8 Cir., 1955). Cf. *Matthews v. Correa,* 135 F.2d 534, 537 (2 Cir., 1943). Indeed, it was on the basis of this very "possession" that the government laid its "foundation" for the introduction into evidence of the exhibits here involved.[2] Thus the government is here seeking to maintain that petitioners had a sufficient "interest" in the premises or in the property seized to justify the use of the evidence against them, while at the same time

[2] "The Court: It was offered and admitted as a document found at this place." (R. 239; and see R. 217, 233, and especially 240, *et seq.*, and, thereafter, 256-267.)

it argues that they have no standing to move to suppress it if it was illegally obtained. This it may not do. *United States v. Dean*, 50 F.2d 905 (D., Mass., 1931).

2. The government's further argument that petitioners failed to comply with Rule 41(e) is equally untenable. That rule does not prevent a motion to suppress from being made during the trial. On the contrary, it expressly provides that the Court, in its discretion, may entertain the motion on the trial. This the Court here did, and at no time during the trial did the government object that the motions were untimely (see, *e.g.*, R. 204, 216, 217, 228). In view of this record, the government has no basis for now asking this Court (Br. 24, n. 15) to "assume" that the motions were denied because of an alleged failure to comply with the rule.

When it appeared on the trial that property seized in violation of the Fourth Amendment was being offered against petitioners, they were at once entitled to invoke the protection not only of that amendment but of the Fifth Amendment as well, even without any application for the return of the things seized. *Agnello v. United States*, 269 U.S. 20, 35. By vesting discretion in the trial Court to entertain the motion during the trial, Rule 41(e) avoids any conflict with the constitutional principles involved. Indeed, any other construction of the rule might well raise serious constitutional questions:

> "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." (*Gouled v. United States*, 255 U.S. 298, 313.)

In any event, the rule was complied with, the trial Court entertained the motions and denied them on the merits, the questions were considered by the Court of Appeals on the merits, and the issue is now squarely before this Court for decision.

B. The arrests of petitioners Kremen and Coleman were invalid.

Despite the government's assertion to the contrary (Br. 30), petitioners Kremen and Coleman have not overlooked the fact that the probable cause necessary to support an arrest does not demand the same strictness of proof as guilt upon a trial. These petitioners have never formulated the issue this way. What they have said is that their arrests were invalid because their mere presence with the fugitives (*which was all the information the officers had at the time the arrests were consummated*) did not give rise to probable cause, no matter how defined, that they either were harboring the fugitives or were accessories after the fact to Thompson's offense.

The government has never met this issue. It has never suggested that the mere presence of petitioners with the fugitives would justify a finding of probable cause for the arrests. The cases of *United States v. Di Re*, 332 U.S. 581, and *Fulbright v. United States*, 91 F.2d 210 (8 Cir., 1937), are clearly to the contrary.[3]

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[3]Though it is true, as the government contends (Br. 26-27), that 18 USCA 3052 was amended in 1951 to eliminate the element of "likelihood of escape", the amendment in no wise reduced the quantum of knowledge required by the officers to establish the existence of probable cause. Indeed, the fact that Congress eliminated the former element while not touching the latter manifests an intention to leave unchanged the pre-existing law on the issue of probable cause.

All the government can rely upon by way of knowledge to establish probable cause prior to the arrest is the circumstance that petitioners were found in the company of the fugitives. Since this is not enough to establish probable cause, the arrests were invalid. The fact that none of the petitioners was observed engaging in any unlawful activities (Br. 28-29) or any conduct from which could be drawn an inference of the existence of "the specific knowledge required by the statute" (*Fulbright v. United States, supra,* at 212) further destroys the basis for a claim of probable cause for the arrests.[4]

If there was probable cause to arrest these petitioners, then there was probable cause to arrest anyone found at the cabin. If that is the law, then no warrant is, or would ever be, required for the arrest of any person found in the presence of a fugitive. We think this is not the law, and we think that this Court must therefore hold these arrests without warrant to have been illegal.

C. The searches and seizures were likewise invalid.

The government argues that the seizures were valid as an incident to a lawful arrest (Br. 31-34). However, since as we have seen, the arrests of petitioners Kremen and Coleman were invalid, that portion of the

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[4]Nothing which subsequently developed (the false identifications, fabrications in the rental of the premises, secret and "cryptic" communications, purchase of automobiles and mimeograph machine, etc.) was known to the agents at the time of the arrests and may not therefore be taken as "evidence" which could have given rise to probable cause. *Byars v. United States,* 273 U.S. 28; *Johnson v. United States,* 333 U.S. 10, 17.

argument falls unless the arrests of Thompson and Steinberg can sustain it. But concededly those persons were arrested *outside* the cabin, and this Court has never held that an arrest outside a dwelling place justifies a subsequent search within it. Cf. *Agnello v. United States,* 269 U.S. 20, 32. It must be remembered that we are here dealing with a warrantless search of a private dwelling and not with a search of a public place or of a business establishment. There is, therefore, a correspondingly heavier burden on the officers to justify an intrusion which on its face is precisely the evil the amendment sought to eradicate. Cf. *Davis v. United States,* 328 U.S. 582, 592-593; *United States v. Rabinowitz,* 339 U.S. 56, 64.[5]

Furthermore, it is specious to argue that the search was "incidental" to the arrests of Thompson and Steinberg. Thompson was arrested so that he might serve a sentence for a crime of which he had already been convicted (Ex. 121; R. 901; and see R. 98, 201). Steinberg was arrested pursuant to a warrant (Ex. 120; R. 900; and see R. 98, 201), charging a Smith Act violation some *two years* earlier. No search in the Sierra Nevada Mountains in 1953 could be justified as incidental to either of those arrests.

Even if, contrary to the foregoing, it could be taken as true that the arrests of Thompson and Steinberg outside the cabin authorized the search without war-

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[5]The government's failure to comment on *Baxter v. United States,* 188 F.2d 119 (6 Cir., 1951), discussed at pages 44-45 of our opening brief, demonstrates, we think, its inability to justify this search without warrant of a private dwelling subsequent to an arrest which took place outside of it.

rant within it, the search itself was unreasonable. The rummaging search through the cabin from the utility room to the kitchen, dinette, and living room, up the stairway to the closets and bedrooms, down again to the porch and out to the automobiles (R. 209-212), together with the mass seizure of every box, book and scrap of paper, all without warrant and for the purpose of securing evidence to be used—and which was used—against petitioners, cannot be squared either with the mandate of the Fourth Amendment or the decisions of this Court. *United States. v. Lefkowitz,* 285 U.S. 452; *Go-Bart Importing Co. v. United States,* 292 U.S. 344; cf. *Di Re v. United States,* 332 U.S. 581; *McDonald v. United States,* 335 U.S. 451.

Most of the cases relied upon by the government to justify this search (Br. 34-38) we have already discussed and distinguished at pages 49-52 of our opening brief.[6] As to *Harris v. United States,* 331 U.S. 145, that case, decided by a majority of but one vote,[7] presented the question of a search following an arrest *made within the house, pursuant to warrant,* and for *specific stolen objects* thought to have been used in effecting a forgery (331 U.S. at 148). Unlike the case at bar, *Harris* was "not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime" (*ibid.* at 153).

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[6] *United States v. Rabinowitz,* 339 U.S. 56; *Agnello v. United States,* 269 U.S. 20; *Marron v. United States,* 275 U.S. 192; *United States v. Lindenfeld,* 142 F.2d 829 (4 Cir., 1944), cert. den. 323 U.S. 761.

[7] Justices Frankfurter, Murphy, Jackson and Rutledge filed eloquent and powerful dissents (331 U.S. at 155, 183, 195).

Nor was it a case where, as here, "officers have entered premises ostensibly for the purpose of making an arrest,[8] but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime" (*ibid.*)[9] The holding of the case, containing, as the dissenters constantly reiterated, serious implications to basic civil liberties,[10] should not be extended beyond the narrow and precise facts which were believed to have justified it. It should not be made the basis for a further dilution of the rights guaranteed by the Fourth Amendment.[11]

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[8]In the case at bar the arrests of Thompson and Steinberg were consummated outside the cabin.

[9]Other distinctions between the cases appear in the balance of the Court's opinion: that the officers acted in good faith for the purpose of discovering specified objects; that the objects sought as well as those discovered were properly subject to seizure; that there was no search for or seizure of "an individual's private papers"; that there was not involved a prosecution based upon the expression of political views (*ibid.*, 154-155).

[10]See, *e.g.*, 331 U.S. at 155. Also illuminating are the observations to be found in 331 U.S. at 159, 161, 164, 171-173, 183, 186, 194, and 196-198.

[11]*Kelley v. United States*, 61 F.2d 834 (8 Cir., 1932), is also relied upon by the government (Br. 37). That case, however, involved the search of a barn from which the officers not only apprehended a strong odor of whiskey but from which they saw one of the defendants run as they approached. The defendant left the door of the barn open and the officers observed vats, boilers, stills and alcohol cans (61 F.2d at. 845). The defendant was brought back to the scene and there arrested. No comparable facts exist here.

At least one subsequent decision (*United States v. Kaplan*, 89 F.2d 869, 870-871 [2 Cir., 1937], per Learned Hand, J.), has distinguished the *Kelley* holding; and one other has impliedly questioned its validity (*Walker v. United States*, 225 F.2d 447 [5 Cir., 1955], as to which compare the majority with the dissent, especially at page 456, n. 10 of the latter).

The balance of the argument (Br. 38-43) does not, we think, meet the contentions already advanced by us. Without repeating those contentions, we respectfully refer the Court to their statement in our opening brief, pages 26-52. It is only necessary to add that the protection of the Fourth Amendment, contrary to the government's view (Br. 43), extends to all buildings within the curtilage, whether they be garages (*Taylor v. United States*, 286 U.S. 1), barns (*Walker v. United States*, 225 F.2d 447 [5 Cir., 1955]), or smoke houses (*Roberson v. United States*, 165 F.2d 752 [6 Cir., 1948]).[12] It would be strange indeed if the protection guaranteed by the amendment could be circumvented by a narrow view of the buildings embraced within its coverage. In any case, the most extensive search here took place within the dwelling; the search of the outhouse has primary significance as demonstrating that even ten days after the arrests, the agents still by-passed constitutional procedures.

Similarly, the argument that the only "fruits of the search" were false identification documents and that other evidence came from other sources (Br. 40) overlooks the basic premise of the amendment. The unlawful search by he officers tainted the entire case. We are less concerned here with the technical aspects of rules of evidence than we are with enforeing that standard of conduct which the amendment imposes upon federal officers. Also involved, of course, is this

[12] *Carney v. United States*, 163 F.2d 784 (9 Cir., 1947), cited to the contrary, is not authority here since in that case the agents procured a search warrant prior to entering the premises (163 F.2d at 785).

Court's concern with the administration of justice in the federal courts, and the question of whether a conviction resulting from a search such as was undertaken here can be permitted to stand.[13]

II.

THE UNCONSTITUTIONAL APPLICATION OF THE STATUTES.

A. The statutes were unconstitutionally pyramided.

In addressing itself to petitioners' argument that "by the very facts of the case" all of the proof which established the harboring of Steinberg also made out the accessoryship after the fact to Thompson's offense, the government details the elements of the crimes specified in the two statutes and points out the differences between them (Br. 45-46). It does not, however, address itself to the *facts of this case* as revealed by the record, which show that as to these petitioners, those statutes were unconstitutionally applied.

Petitioners have never suggested that on their face 18 USCA 3 or 18 USCA 1071 are invalid. We have said that on the record here, and contrary to the very distinctions so carefully spelled out by the gov-

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[13]The attempt to segregate each item of evidence must fail, not only for the reason that the principles underlying the amendment will not permit such an approach to the case at bar, but also because on this record "all the evidence" was introduced against all petitioners (R. 74-75, 901).

The cumulative effect upon the jury of the mass of illegally seized evidence was obviously significant. An appellate court may not now sift through the "dead record" to see if enough untainted evidence can be found to justify the conviction. Cf. *Bollenbach v. United States*, 326 U.S. 607, 614-616; *Kotteakos v. United States*, 328 U.S. 750; *Mesarosh v. United States*, 352 U.S. 1.

ernment, the identical evidence which made out the offense under one statute also made out the offense under the other; we have also said that as to petitioner Kremen there was not a scintilla of additional proof offered vis-a-vis Thompson, than there was vis-a-vis Steinberg.[14] If, as the government apparently now urges additional evidence was required to convict petitioners of Counts I and II different from that required to convict them under Counts III and IV, then such proof, as to Kremen and Steinberg, was not offered. On the other hand, if the same proof can sustain the convictions on both sets of counts, then, and on this record, Kremen and Coleman were placed in double jeopardy. We do not see how the government can have it both ways on this issue.

What has just been said applies equally to the conspiracy counts. The government makes an elaborate argument that there were two separate conspiracies, which it claims became linked up just prior to the arrests (Br. 49-52). But this argument is inconsistent with the record made in this case. Thus the government says in its brief (p. 51), that the acts of renting and occupying the cabin were acts of the "Steinberg group", but in its indictment it charged these very acts as overt acts in furtherance of the "Thompson

[14]The government's suggestion that, since Kremen's sentence on the harboring count was concurrent with her sentence on the accessoryship count, this argument is not "helpful here" (Br. 44), overlooks the fact that there were differences in the length of sentence imposed, and that if she is successful in invalidating the convictions on the accessoryship charge and its conspiracy counterpart, she will be liable (if she is unsuccessful in the balance of her argument) to a sentence of six months rather than one year.

conspiracy" (R. 5). Similarly, the government in its brief (p. 50) refers to evidence of Coleman's travels with Thompson prior to their arrival in California as overt acts of the "Thompson conspiracy"; but, on its own motion, that very evidence was received by the trial Court as against all defendants in connection with "both" conspiracies without any qualification or limitation (R. 74-75, 901).

If there were in fact two separate conspiracies, it is strange that the overt acts in both of them would have been identical, and that the identical evidence would have been used by the government to establish each of them. If the position now urged by the government be correct, then it could very well have prosecuted petitioners for participating in *three* conspiracies: the "Steinberg conspiracy", the "Thompson conspiracy", and the newly formed (Br. 53) "Thompson-Steinberg conspiracy". However, the record shows that from the outset the government treated this all as one conspiracy, which the prosecutor in his opening statement characterized as "a Communist Party conspiracy to protect its leadership" (R. 153; and see R. 155, *et seq.*). The splitting of that single conspiracy into two, because two leaders rather than one were involved, is utterly unwarranted.[15]

Finally, it is to be observed that the addition of conspiracy counts to the substantive counts is, *on the*

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[15]Petitioners could hardly have been charged with eight separate conspiracies, if all four of the *Dennis* fugitives (see *United States v. Hall*, 198 F.2d 726, 730 [2 Cir., 1952]) and all four of the *Flynn* fugitives (see Br. 5) had been found at the cabin. Cf. *Rayborn v. United States*, 234 F.2d 368, 370 [6 Cir., 1956]).

facts of this case, unjustified. For two or more persons cannot harbor a third at the same time and place or act jointly as accessories after the fact, without there, of necessity, being an agreement between them to do so. If, as here, joint action is necessary in the execution of the substantive offenses, then conspiracy charges may not be added to those offenses. *Pinkerton v. United States,* 328 U.S. 640, 643. The fact that the substantive offenses here involved cannot be committed absent an agreement does not, as the government believes (Br. 55), emphasize the solid character of the evidence from which the jury could infer the existence of a conspiracy; what it does, is to show that when substantive offenses, such as these, are committed by a plurality of persons, a conspiracy count may not be added to the substantive offense. This is so because, since the substantive offense of necessity embraces the agreement, the addition of a conspiracy charge means the imposition of double punishment for a single offense.

B. Section 3 of Title 18 was unconstitutionally applied here.

Although it may be true that "punishment" in the legal sense can be imposed only after conviction (Br. 56), this does not meet petitioners' argument. For Section 3 on its face deals with those who assist the offender "*in order to* hinder or prevent his apprehension . . . or punishment". The question therefore is may one before trial assist an offender in order to hinder his punishment. We believe that this may be, and is frequently, done. In other words, it is possible *even before trial and conviction* to give assistance "in

order to" hinder punishment. That it is possible to do so after conviction as well is no answer to the argument that the phrase, having at least these two meanings, is ambiguous and, since it is found in a criminal statute, must be the more narrowly interpreted.

Furthermore, since it is possible to give aid in order to prevent punishment even prior to trial, the government's reading of the statute (that the punishment referred to contemplates only a post-conviction situation) is too strained. When Congress intended to deal with post-conviction situations, it used clear and unambiguous language. Thus, 18 USCA 1071 (as amended August 20, 1954, Chap. 771, 68 Stat. 747), uses the words "after conviction", and 18 USCA 752 (as amended May 28, 1956, Chap. 331, 70 Stat. 216), uses the words "conviction of any offense", as does 18 USCA 751. Its failure to do so in Section 3 is not without significance. *Baltimore etc. R. R. Co. v. Grant,* 98 U.S. 398, 403.

Whatever dispute there may be about the common law scope of accessoryship, the fact of the matter is that the use of the word "punishment" in a context which renders it at least ambiguous, taken together with the failure of Congress to specify whether assistance "in order to prevent . . . punishment" meant assistance rendered before or after conviction, makes the statute unconstitutionally vague as applied to petitioner herein.

C. The statutes were applied to petitioners absent proof of guilty knowledge.

In elaborating upon the separateness of the elements required to make out a case on each of the two substantive offenses, the government emphasizes that petitioners' knowledge of Thompson's conviction, and their knowledge of the existence of process for the arrest of Steinberg, were each essential elements of the respective offenses (Br. 45-46). Absent proof of such specific knowledge (*Fulbright v. United States*, 91 F. 2d 210, 212 [8 Cir., 1937]), there can be no conviction on either offense.

Yet in arguing the point now under consideration, the government, unable to point to any evidence establishing such knowledge, asks the Court to "suppose" that petitioners knew of Thompson's conviction (Br. 62). Suppositions or assumptions, however, are no substitute for proof, and the convictions under Counts I and II cannot be sustained upon any such basis. As to Counts III and IV, the government does not even suggest that the Court may "suppose" that petitioners Kremen or Coleman knew of the existence of process for Steinberg's arrest; thus it is clear that there is a total failure of proof on those counts.

Petitioners do not seek, as the government erroneously assumes (Br. 63) to distinguish *Holland v. United States*, 348 U.S. 121, on the ground that it is a "tax case". We thought we had made it clear (Opening Br. 75-76) that there, unlike here, the government had offered "overwhelming . . . proof" (348 U.S. at 135) of "every element of the offense . . . "(*ibid.*, at

138). Here, admittedly, knowledge of Thompson's conviction and of process for the arrest of Steinberg were essential elements of the offenses charged. The government has not proved such knowledge, and its assumptions, suppositions and suspicions will not avail it.[16]

III.

THE DEFECTIVE INDICTMENT AND THE VARIANCE BETWEEN IT AND THE PROOF.

The government concedes that the indictment "mistakenly" refers to Thompson's offense as a conspiracy to organize a society for the overthrow of government rather than one for the advocacy of that doctrine (Br. 64). But it argues that this defect, as well as the variance between the pleading and the proof which resulted therefrom, is "insubstantial". We do not believe that the Sixth Amendment's requirement that a defendant "be informed of the nature and cause of the accusation against him" may be thus summarily dismissed.

A defendant is to be apprised of the offense charged with sufficient clarity so that he can make a defense and so that he may plead jeopardy in the event of a

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[16] ". . . where the prosecution is unable to muster evidence sufficient to overcome the presumption [of innocence], there will be an acquittal, even though the defendant be actually guilty.

"This is a calculated risk which society is willing to take. It does so because it regards the acquittal of guilty persons less objectionable than the conviction of innocent persons." *Reynolds v. United States*, 238 F.2d 460, 463, (9 Cir., 1956).

subsequent indictment. No matter how "insubstantial" the error, if it deprives the accused of either of these two protections, his constitutional rights are invaded. If the indictment on its face does not clearly charge the crime, or if it charges two or more crimes so ambiguously that "no one can say with certainty" of which the accused has been convicted (*Sutton v. United States,* 157 F. 2d. 661, 665 [5 Cir., 1946]), it is constitutionally defective.[17] Here the indictment, for the reasons already specified (Opening Br. 79-81), fails to meet this test. Nor does the allegation that Thompson's conduct was in violation of specified sections of the Smith Act cure the defect. That allegation is not one of fact but is rather a legal conclusion of the pleader which "constitutes no part of the description of the offense" (*Sutton v. United States, supra,* at 664; see, also, *Alabama Packing Co. v. United States,* 167 F. 2d 179, 181 [5 Cir., 1948]).

Further, a variance between the pleading of one offense and the proof of another is not "trifling", as the government suggests (Br. 67); rather it is material and prejudicial. This indictment informed petitioners that the government would seek to prove that they were accessories to one crime and not that it would seek to prove that they were accessories to another, and quite different, crime. Cf. *Neal v. United States,* 102 F. 2d 643, 648 (8 Cir., 1939).

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[17] While a bill of particulars cannot cure a defect in an indictment, it may be of some help in assisting a defendant to prepare for trial. Here petitioners' motion for such a bill (R. 15) was denied (R. 72).

We cannot understand the government's observation (Br. 67, n. 43) that petitioners do not question the propriety of the removal from the jury of the question of Thompson's Smith Act conviction. We thought that we had questioned quite sharply the trial jud 's handling of this entire situation (Opening Br. -86). We insist that since the proof (Ex. 121; R. 896, 901) did not support the charge, it was error to tell the jury that it did.[18]

CONCLUSION.

As we said in our opening brief, these convictions cannot stand, not only because of the defects in the indictment, the proof and the charge, but because the government has taken a single act of harboring and has compounded it into accessoryship and conspiracy. Furthermore, in any case, the government has procured the convictions of these petitioners on the basis of evidence which was illegally seized in an unlawful raid upon their dwelling.

For the foregoing reasons the judgment of the Court below should be reversed and the cause remanded to the District Court with directions to enter

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[18]Furthermore, merely because a conviction is a matter of "official court record" (Br. 67, n. 43), the government is not exempted from proving that which it charges. It is at least questionable whether the judgment of conviction alone is sufficient to carry the burden. Cf. *Barone v. United States*, 205 F.2d 909, 914 (8 Cir., 1953). In the face of the objections made below (R. 893-896, 928), the exhibit should have been rejected and the jury instructed quite differently.

an order granting the motions for judgments of acquittal made on behalf of each of the petitioners.

Dated, San Francisco, California,
February 11, 1957.

Respectfully submitted,
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